



Right To Know <requests@righttoknow.ie>

AIE request

Right To Know <requests@righttoknow.ie>

Fri, Apr 5, 2019 at 1:07 PM

To: "CorporateSupport.Unit" <corporatesupport.unit@dccae.gov.ie>

Dear DCCAE

Under the AIE Regulations could you send us the correspondence with the coal industry regarding threats of litigation in relation to a proposed nationwide ban on smoky coal. The issue is reported today in the Irish Times (<https://www.irishtimes.com/news/environment/government-delays-plans-for-smoky-coal-ban-following-legal-threats-from-industry-1.3849945>)

Please provide the information electronically by email.

Many thanks

R2K

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Right to Know CLG, Registered in Dublin, Ireland No. 565565

Registered Office: 25 Herbert Place, Dublin 2

Directors: G Sheridan, M. Browne, K Foxe



RE: Acknowledgement of AIE2019 198

Emmet Fahy <Emmet.Fahy@dccae.gov.ie>
To: Right To Know <requests@righttoknow.ie>
Cc: "CorporateSupport.Unit" <CorporateSupport.Unit@dccae.gov.ie>

Wed, Apr 17, 2019 at 11:51 AM

Dear Right To Know,

I have removed the "Draft" watermark that was on the first page. Apologies, but this is now the final version of the decision on your AIE request.

Best regards

Emmet Fahy

Emmet Fahy, Higher Executive Officer

Air Quality, Noise and Radiation Division

Roinn Cumarsáide, Gníomhaithe ar son na hAeráide & Comhshaoil

Department of Communications, Climate Action & Environment

Bóthar an Bhaile Nua, Loch Garman, Y35 AP90

Newtown Road, Wexford, Y35 AP90

T +353 (0)1 6782087

Emmet.Fahy@dccae.gov.ie www.dccae.gov.ie



**Roinn Cumarsáide, Gníomhaithe
ar son na hAeráide & Comhshaoil**
Department of Communications,
Climate Action & Environment

From: Emmet Fahy
Sent: 17 April 2019 11:37
To: 'Right To Know'
Cc: CorporateSupport.Unit
Subject: RE: Acknowledgement of AIE2019 198

Dear Right to Know,

I attach the decision letter to your AIE request. Reference: AIE 2019 198

Yours sincerely

Emmet Fahy

Emmet Fahy, Higher Executive Officer

Air Quality, Noise and Radiation Division

Roinn Cumarsáide, Gníomhaithe ar son na hAeráide & Comhshaoil

Department of Communications, Climate Action & Environment

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Emmet.Fahy@dccae.gov.ie www.dccae.gov.ie



**Roinn Cumarsáide, Gníomhaithe
ar son na hAeráide & Comhshaoil**
Department of Communications,
Climate Action & Environment



17 April 2019

Right to Know
25 Herbert Place, Dublin 2
requests@righttoknow.ie

Re: AIE request [2019 198]

Dear Right to Know

I refer to your request which you made under the European Communities (Access to Information on the Environment) Regulations 2007 to 2018 (S.I. No. 133 of 2007, S.I. No. 662 of 2011, S.I. 615 of 2014 and S.I. No. 309 of 2018) (hereafter referred to as the AIE Regulations) for access to records held by this Department in relation to “correspondence with the coal industry regarding threats of litigation in relation to a proposed nationwide ban on smoky coal. The issue is reported today in the Irish Times (<https://www.irishtimes.com/news/environment/government-delays-plans-for-smoky-coal-ban-following-legal-threats-from-industry-1.3849945>)”.

Summary of Decision

I have made a decision on your request of April 5 and have identified 14 records which are relevant to your request. I regret, however, that these records cannot be released to you, having regard to the provisions of article(s) 8 and 9 of the AIE Regulations.

Grounds that, subject to article 10, mandate a refusal

8. A public authority shall not make available environmental information in accordance with article 7 where disclosure of the information—
- (a) would adversely affect—
 - (iv) without prejudice to paragraph (b), the confidentiality of the proceedings of public authorities, where such confidentiality is otherwise protected by law (including the Freedom of Information Acts 1997 and 2003 with respect to exempt records within the meaning of those Acts);

Discretionary grounds for refusal of information

9. (1) A public authority may refuse to make available environmental information where disclosure of the information requested would adversely affect—
- (c) commercial or industrial confidentiality, where such confidentiality is provided for in national or Community law to protect a legitimate economic interest, or
- (2) A public authority may refuse to make environmental information available where the request—
- (d) concerns internal communications of public authorities, taking into account the public interest served by the disclosure.

Public Interest Test & Information on Emissions

In reaching the decision to refuse your request I have, in accordance with Article 10(1), examined whether your request relates information on emissions into the environment and have determined that it does not.

AND

Furthermore, in accordance with Article 10(3) I have weighed the public interest served by disclosure against the interest served by refusal of your request. I have determined that the public interest would not be served by disclosing the information you request.

The attached Summary of decision-making summarises my decision and the enclosed Schedule of Records sets out the grounds of refusal in the case of each record. A copy of the relevant provisions of the AIE Regulations is also attached for your information.

Right of appeal

Under Article 11 of the AIE Regulations you have a right to seek an internal review of this decision. An internal review involves a complete reconsideration of the matter by a member of staff of this Department of the same or higher rank than the original decision-maker, who may affirm, vary or annul the original decision made. The review decision will be communicated to you within one month of receipt of your application for an internal review.

In the event that you wish to make such an appeal, you can do so by writing to the Information Officer corporatesupport.unit@dccae.gov.ie, referring to this decision and quoting your AIE reference number. You must make your appeal within one month of the date of this notification, (the making of a late appeal may be permitted in appropriate circumstances).

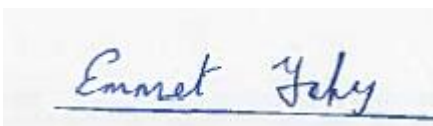
Refine request

It is also open to you to refine your request and submit a new application under the AIE Regulations.

Contact details

Please contact me at 016782087 or emmet.fahy@dccae.gov.ie if you consider I can assist you in any matter relating to your request.

Yours sincerely,

A handwritten signature in blue ink that reads "Emmet Fahy". The signature is written in a cursive style and is positioned above a horizontal blue line.

Emmet Fahy
Higher Executive Officer
Air Quality, Radiation and Noise Division

| Final Record No | Date of Record | Brief description | No. of pages | Decision: Grant/Part Grant/Refuse | Basis of Refusal: Section of AIE Regs. | Other |
|-----------------|----------------|--|--------------|-----------------------------------|---|-------|
| 1 | 31/05/2018 | Cover Email to solicitor firm | 1 | Refuse | 8(a)(iv), 9(1)(c), 9(2)(d) | |
| 2 | 31/05/2018 | Letter from Department to solicitor firm | 1 | Refuse | 8(a)(iv), 9(1)(c), 9(2)(d) | |
| 3-5 | 29/05/2018 | Acknowledgement of email received from solicitor firm | 3 | Refuse | 8(a)(iv), 9(1)(c), 9(2)(d) | |
| 6 | 17/05/2018 | Email cover with letter to Department attached. | 1 | Refuse | 8(a)(iv), 9(1)(c) | |
| 7-10 | 17/05/2018 | Letter from solicitor firm to Minister | 4 | Refuse | 8(a)(iv), 9(1)(c) | |
| 11-13 | 27/11/2015 | Cover note containing Letter to solicitor firm from Minister | 3 | Refuse | 8(a)(iv), 9(1)(c), 9(2)(d) | |
| 14-15 | 27/10/2015 | Letter to solicitor firm from Minister | 2 | Refuse | 8(a)(iv), 9(1)(c) | |
| 16 | 26/02/2016 | Cover note and letter to Department from solicitor firm | 1 | Refuse | 8(a)(iv), 9(1)(c) | |
| 17-20 | 26/02/2016 | Letter from coal firm re regulation of coal | 3 | Refuse | 8(a)(iv), 9(1)(c) | |
| 21-56 | 26/02/2016 | Further correspondance from coal firm re regulation of coal | 34 | Refuse | 8(a)(iv), 9(1)(c) | |
| 57 | 25/09/2015 | Cover note containing correspondance from solicitor firm to Minister | 1 | Refuse | 8(a)(iv), 9(1)(c) | |
| 58-59 | 25/09/2015 | Letter from solicitor firm to Minister | 2 | Refuse | 8(a)(iv), 9(1)(c) | |
| 60-67 | 25/09/2015 | Letter from solicitor firm to Minister | 8 | Refuse | 8(a)(iv), 9(1)(c) | |
| 68 | 05/09/2018 | Letter from solicitor firm to Minister | 1 | Refuse | 8(a)(iv), 9(1)(c) | |
| | | | | | | |



Right To Know <requests@righttoknow.ie>

Re: Acknowledgement of AIE2019 198

Right To Know <requests@righttoknow.ie>
To: Emmet Fahy <Emmet.Fahy@dccae.gov.ie>

Wed, Apr 17, 2019 at 3:38 PM

Dear Emmet

Please conduct an internal review, there are no reasons given in your decision, but it is not credible that the harms envisaged by the exceptions cited can flow from unprompted threats of legal action coming from a third party

Thanks
R2K



AIE20198

Kevin McCormick <Kevin.Mccormick@dccae.gov.ie>
To: "requests@righttoknow.ie" <requests@righttoknow.ie>
Cc: CorporateServices <CorporateServices@dccae.gov.ie>

Tue, May 7, 2019 at 2:25 PM

Dear Righttoknow,

Please see the attached internal review decision letter and revised schedule in respect of AIE20198,

Regards,

Kevin McCormick

Assistant Principal, Aarhus, the Bioeconomy & Environmental Awareness Division

Roinn Cumarsáide, Gníomhaithe ar son na hAeráide & Comhshaoil

Department of Communications, Climate Action & Environment

Bóthar an Bhaile Nua, Loch Garman, Y35 AP90

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kevin.mccormick@dccae.gov.ie www.dccae.gov.ie

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Tá eolas sa teachtaireacht leictreonach seo (agus b'fhéidir sa chomhaid ceangailte leis) a d'fhéadfadh bheith príobháideach nó faoi rún. Is le h-aghaidh an duine/na ndaoine nó le h-aghaidh an aonáin atá ainmnithe thuas agus le haghaidh an duine/na ndaoine sin amháin atá an t-eolas. Murab ionann tusa agus an té a bhfuil an teachtaireacht ceaptha dó biodh a fhios agat nach gceadaítear nochtadh, cóipeáil, scaipeadh nó úsáid an eolais agus/nó an chomhaid seo. Más trí earráid a fuair tú an teachtaireacht leictreonach seo cuir, más é do thoil é, an té ar sheol an teachtaireacht ar an eolas láithreach. Deimhnítear leis seo freisin nár aims odh víreas sa phost seo tar éis a scanadh.

2 attachments



AIE20198 Internal Appeal - Vary decision.pdf
151K



20190507 Amended Schedule AIE 20198.pdf
184K

7 May, 2019.

Righttoknow
requests@righttoknow.ie

Re: AIE request 20198

Dear R2K,

I refer to your request which you made under the European Communities (Access to Information on the Environment) Regulations 2007 to 2014 (S.I. No. 133 of 2007, S.I. No. 662 of 2011, S.I. 615 of 2014 and S.I. No. 309 of 2018) (hereafter referred to as the AIE Regulations) for an internal review of the decision to refuse access to records requested by you.

“Under the AIE Regulations could you send us the correspondence with the coal industry regarding threats of litigation in relation to a proposed nationwide ban on smoky coal. The issue is reported today in the Irish Times (<https://www.irishtimes.com/news/environment/government-delays-plans-for-smoky-coal-ban-following-legal-threats-from-industry-1.3849945>)”

I refer to your request for a review of the decision on this request made by this Department 17 April, 2019, not to release the records which you requested access under the European Communities (Access to Information on the Environment) Regulations 2007 to 2018 (S.I. No. 133 of 2007, S.I. No. 662 of 2011 and S.I. No. 615 of 2014) (hereafter referred to as the AIE Regulations).

Result of the internal review of this decision

As you will be aware from the acknowledgement of your request for an internal review, I was assigned to review your request. I made a decision on your review request on 7 May, 2019.

In my review of the original decision, it was noted that the schedule attached included a non-existent record. Record number 68 is referenced in the schedule. I have made enquires on this record and I understand that the inclusion of this arises from a typographical error and no such record exists.

67 pages of records are, therefore, identified in the revised schedule attached. Article 8 and 9 of the Regulations outline grounds that, subject to article 10 of the AIE Regulations, mandate a refusal. In reaching my decision, I have examined whether your request relates to information on emissions to the environment and have determined that it does not.

Decision to refuse access upheld for Record numbers 1-5 and 11-15

These are records created by the Department of Communications, Climate Action and Environment in response to correspondence from the coal industry arising from proposals to extend nationwide a ban on bituminous coal. Article 8(a)(iv)(b) states grounds that, subject to Article 10, mandate a refusal. It provides that:

“A public authority shall not make available environmental information in accordance with Article 7 where disclosure of the information –

- (a) would adversely affect- (iv) without prejudice to paragraph (b), the confidentiality of the proceedings of public authorities, where such confidentiality is otherwise protected by law”

Section 29 The Freedom of Information Acts provide for the exemption of records as follows:

29. (1) A head may refuse to grant an FOI request—(a) if the record concerned contains matter relating to the deliberative processes of an FOI body (including opinions, advice, recommendations, and the results of consultations, considered by the body, the head of the body, or a member of the body or of the staff of the body for the purpose of those processes), and (b) the granting of the request would, in the opinion of the head, be contrary to the public interest, and, without prejudice to the generality of *paragraph (b)*, the head shall, in determining whether to grant or refuse to grant the request, consider whether the grant thereof would be contrary to the public interest by reason of the fact that the requester concerned would thereby become aware of a significant decision that the body proposes to make.”

I have balance the public interest in on these records as follows. It can be argued that the public interest might be served by releasing these records, as in that case, the public would have an insight, at an early juncture, into the Department’s deliberative process. However, it can also be argued that the public interest might be significantly adversely impacted by the release of these records as this would negatively impact the Department’s ability to conduct the deliberative process effectively. In considering these issues, on balance, I am satisfied that the records should not be released. Accordingly for these records, I uphold the decision made on 17 April, 2019.

Decision for Record numbers 6-10 and 16-67

These consist of records received from the coal industry. Article 8(a)(ii) states grounds that, subject to Article 10, mandate a refusal. It provides that:

“A public authority shall not make available environmental information in accordance with Article 7 where disclosure of the information –

(a) would adversely affect- (ii) the interests of any person who, voluntarily and without being under, a legal obligation to do so, supplied the information requested, unless that person has consented to the release of that information,”

Article 9(1)(c) provides that:

“A public authority may refuse to make available environmental information where disclosure of the information would adversely affect- commercial or industrial confidentiality is provided for in national or Community law to protect a legitimate economic interest,”

Section 36(1)(b) of The Freedom of Information Acts provide for the exemption of records as follows:

“Subject to *subsection (2)*, a head shall refuse to grant an FOI request if the record concerned contains—

(b) financial, commercial, scientific or technical or other information whose disclosure could reasonably be expected to result in a material financial loss or gain to the person to whom the information relates, or could prejudice the competitive position of that person in the conduct of his or her profession or business or otherwise in his or her occupation”

I have balanced the benefit to the public in accessing these third party records with the importance of communicating to a public authority in confidence. I am satisfied that the releasing of these records could have a significant negative impact on future communications by members of the public and an adverse effect on the commercial and industrial confidentiality of the persons involved.

I have considered the possible redaction of the records sought to enable partial release but I am mindful that the industry in Ireland consists of a very limited number of companies and it would be impractical to attempt the release of redacted records in such a manner that would not prejudice the confidentiality and commercial sensitivities referred to above. Accordingly, I have decided that the decision made by the initial decision-maker for Record numbers 6-10 and 16-67 should be varied. I am satisfied that access to the records should be refused but vary the basis for the refusal to include Article 8(a)(ii).

A summary of my decision is set out in the attached schedule.

Right of appeal

Under Article 12 of the AIE Regulations you may appeal this decision, by writing to the Commissioner for Environmental Information at the address given below:

Commissioner for Environmental Information
18 Lower Leeson Street
Dublin 2

It is also possible to appeal on the website of the Commissioner www.ocei.ie.

If you wish to appeal, you should do so within 1 month of this notification. The fee for such an appeal is €50 or €15 if you are the holder of a medical card or the dependent of a holder of a medical card.

Contact details

Please contact me at should you consider I can assist you in any matter relating to your request.

Yours sincerely,



Kevin McCormick
Assistant Principal
Aarhus, the Bioeconomy and Environmental Awareness Division
Department of Communications, Climate Action & Environment
Newtown Road
Wexford
Y35AP90

| Schedule of Records - AIE Request 20198 | | | | | | |
|---|----------------|--|--------------|-----------------------------------|---|----------------|
| Final Record No | Date of Record | Brief description | No. of pages | Decision: Grant/Part Grant/Refuse | Basis of Refusal: Section of AIE Regs. | Other |
| 1 | 31/05/2018 | Cover Email to solicitor firm | 1 | Refuse | 8(a)(iv), 9(1)(c), 9(2)(d) | |
| 2 | 31/05/2018 | Letter from Department to solicitor firm | 1 | Refuse | 8(a)(iv), 9(1)(c), 9(2)(d) | |
| 3-5 | 29/05/2018 | Acknowledgement of email received from solicitor firm | 3 | Refuse | 8(a)(iv), 9(1)(c), 9(2)(d) | |
| 6 | 17/05/2018 | Email cover with letter to Department attached. | 1 | Refuse | 8(a)(iv), 9(1)(c) | FOI S.36(1)(b) |
| 7-10 | 17/05/2018 | Letter from solicitor firm to Minister | 4 | Refuse | 8(a)(iv), 9(1)(c) | FOI S.36(1)(b) |
| 11-13 | 27/11/2015 | Cover note containing Letter to solicitor firm from Minister | 3 | Refuse | 8(a)(iv), 9(1)(c), 9(2)(d) | |
| 14-15 | 27/10/2015 | Letter to solicitor firm from Minister | 2 | Refuse | 8(a)(iv), 9(1)(c) | |
| 16 | 26/02/2016 | Cover note and letter to Department from solicitor firm | 1 | Refuse | 8(a)(iv), 9(1)(c) | FOI S.36(1)(b) |
| 17-20 | 26/02/2016 | Letter from coal firm re regulation of coal | 3 | Refuse | 8(a)(iv), 9(1)(c) | FOI S.36(1)(b) |
| 21-56 | 26/02/2016 | Further correspondance from coal firm re regulation of coal | 34 | Refuse | 8(a)(iv), 9(1)(c) | FOI S.36(1)(b) |
| 57 | 25/09/2015 | Cover note containing correspondance from solicitor firm to Minister | 1 | Refuse | 8(a)(iv), 9(1)(c) | FOI S.36(1)(b) |
| 58-59 | 25/09/2015 | Letter from solicitor firm to Minister | 2 | Refuse | 8(a)(iv), 9(1)(c) | FOI S.36(1)(b) |
| 60-67 | 25/09/2015 | Letter from solicitor firm to Minister | 8 | Refuse | 8(a)(iv), 9(1)(c) | FOI S.36(1)(b) |